

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

**JULY 18, 1995**

**NOTICE**

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0714-CR-NM

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**RICHARD L. HACKETT,**

**Defendant-Appellant.**

APPEAL from a judgment of the circuit court for Oconto County:  
LARRY L. JESKE, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Richard Hackett appeals a judgment convicting him of sexual contact with a twelve year old, contrary to § 948.02(1), STATS. Hackett was sentenced to an indeterminate term of not more than six years. Hackett's appellate counsel has filed a no merit report pursuant to RULE 809.32, STATS., and *Anders v. California*, 386 U.S. 738 (1967).

Hackett received a copy of the report and filed a response. After considering the report, the response and making an independent review of the

record, we conclude that there is no arguable merit to any issue that could be raised on appeal.

The no merit report addresses the issues of the sufficiency of the evidence, effective assistance of counsel and sentencing. It concludes that these issues have no arguable merit and that the record discloses no other potential appellate issue. Hackett's response challenges the sufficiency of the evidence: he argues that he was set up and that the victim and his friend lied about the charges. Based upon our independent review of the record, we conclude that the record fails to disclose any issue of arguable merit.

An appellate court may not reverse a criminal conviction unless the evidence, viewed most favorably to the verdict, is so insufficient in probative value that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). It is the jury's function, not the appellate court's, to judge the weight and credibility of testimony. *Cogswell v. Robertshaw Controls Co.*, 87 Wis.2d 243, 249-50, 274 N.W.2d 647, 650 (1979). To be incredible as a matter of law, the evidence relied upon must be inherently or patently incredible, such as evidence in conflict with the laws of nature or fully established or conceded facts. *Day v. State*, 92 Wis.2d 392, 400, 284 N.W.2d 666, 671 (1979).

Here, the victim testified that he was twelve years of age, that he went for a car ride with his friend and Hackett, age thirty-eight. The victim testified that during the car ride, Hackett, while fastening the victim's seat belt, "slid his hand across my penis." The victim demonstrated for the jury and the record reflects that "he [made] a rubbing motion with his hand on his penis." The friend testified that when he saw this he told Hackett that he was going to tell, and Hackett grabbed a hatchet and stated that "this is what I do with little boys that tell, I cut off their pee pees."

Before Hackett may be found guilty of the offense of sexual contact, the State must prove beyond a reasonable doubt the following elements: (1) Hackett had sexual contact with the victim, defined here as intentional touching, directly or through clothing, of the victim's penis; (2) for the purpose of sexual arousal or gratification; and (3) the victim had not attained the age of thirteen at the time of the offense. Section 948.02(1), STATS.

The victim's testimony supports the element of intentional touching of his penis. Based upon the statements attributable to Hackett, a reasonable jury could find that the touching was not accidental, but rather for the purpose of sexual arousal. We conclude that a reasonable jury could conclude that the facts of record support the elements of the offense beyond a reasonable doubt.

Hackett's assertions attack the credibility of the witnesses. However, "[t]he determination of credibility is not within the scope of appellate review." *Day*, 92 Wis.2d at 402, 284 N.W.2d at 671. Rather, credibility of witnesses is a matter for a jury's determination.

Upon our independent review of the record, we conclude that the record contains no potential issue of arguable merit. The record shows that the trial court reasonably exercised its discretion when imposing the six-year sentence. The record reveals no basis to challenge defense counsel's performance. We conclude that the no merit report correctly describes the record and applies a correct legal analysis.

Because the record reveals no issue of arguable merit, the judgment is affirmed, and Attorney Steven D. Phillips is discharged from further obligation to represent Hackett in this matter.

*By the Court.* – Judgment affirmed.